

MEMORANDUM



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CONFIDENTIAL ATTORNEY WORK PRODUCT ATTORNEY-CLIENT COMMUNICATION

TO: JERSEY CITY PUBLIC SCHOOL DISTRICT BOARD OF EDUCATION

FROM: GENOVA BURNS, LLC

DATE: JUNE 29, 2018

RE: JERSEY CITY BOARD OF EDUCATION'S OPTION TO CHALLENGE
REDUCTION IN STATE AID AS IT PERTAINS TO THE STATE FUNDING
REFORM ACT

Question Presented

1. What is the procedure available to the Jersey City Board of Education ("JCBOE") to challenge any loss of state aid and reduction of Adjustment Aid provided through the State Funding Reform Act ("SFRA")?
2. What causes of action does JCBOE have to challenge any reduction in Adjustment Aid and how viable is each claim?

Brief Answer

1. While the JCBOE has several options when challenging the underfunding of state aid as well as the proposed reduction, and eventual elimination, of Adjustment Aid as it pertains to the SFRA, the recommended course of action would be for the JCBOE to file a Petition of Appeal, along with an identified student(s), with the Commissioner of Education ("Commissioner") seeking a declaratory judgment that the State failed to fully fund any type of aid required by the SFRA. Once a petition is filed with the Commissioner for a declaratory ruling, the JCBOE could then apply for a summary decision, via motion. We would not recommend filing an Order to Show Cause in Superior Court as same would likely be transferred to the Commissioner and/or be denied as not satisfying the necessary elements for a preliminary injunction.

2. The JCBOE would have two arguments that the reduction, and ultimate elimination, of Adjustment Aid would violate the constitutional mandate that the students of Jersey City be provided a thorough and efficient education. First, the JCBOE would argue that the plain language of the SFRA dictates that Adjustment Aid must continue as long as the underlying purpose of Adjustment Aid remains. Secondly, the JCBOE would argue that Jersey City's tax base would be severely overburdened if Adjustment Aid was reduced as proposed by the Legislature as significant revenue would need to be generated from taxes. These arguments would be made against the backdrop that the State has failed to fully fund the SFRA during its implementing years, negating the Adjustment Aid's underlying purpose and intention.

Legal Analysis

I. Procedure for Any Challenge

As previously suggested, our recommendation would be for the JCBOE to proceed before the Commissioner to challenge a loss of funding or a reduction of Adjustment Aid pursuant to the SFRA. Pursuant to N.J.S.A. 18A:6-9, the Commissioner is vested with the sole jurisdiction to hear controversies and disputes that arise under school law. Indeed,

[F]unding issues are unique to individual school districts, towns, and even classrooms in terms of how funds can be effectively spent to achieve a quality education, the Commissioner is in a much better position than the Court to determine the amount of funds needed to support specific programs.

Abbott v. Burke, 149 N.J. 145, 213 (1997) (hereinafter “Abbott IV”). Finding that the resolution of constitutional issues involving “thorough and efficient” education is especially fact sensitive and relates primarily to areas of educational specialization, the Court in Abbott I held that administrative remedies must first be exhausted prior filing a matter in court. 100 N.J. at 301.

We would caution against filing an Order to Show Cause, as we believe it would ultimately be denied for failing to satisfy the elements necessary for a preliminary injunction. In order to establish that a preliminary injunction is warranted, JCBOE would be required to show that: (1) a preliminary injunction is needed to prevent irreparable harm; (2) the legal right underlying the plaintiff’s claim is well settled; (3) the material facts are uncontroverted; and (4) the relative hardships of the parties weigh in favor of granting a preliminary injunction to the plaintiff. See Crowe v. De Gioia, 90 N.J. 126, 132-135 (1982). “Each of these factors must be clearly and convincingly demonstrated.” Waste Management of New Jersey, Inc. v. Union County Utilities

Authority, 399 N.J. Super. 508, 520 (2008). Additionally, the irreparable harm, sought to be cured or avoided by the preliminary injunction, must be “substantial and imminent.” Id.

Under the facts as they currently exist, a preliminary injunction would likely be denied as a result of JCBOE being unable to demonstrate that the irreparable harm is imminent and that the claims are well settled. First, given that the newly passed bills will not take effect until the 2019-2020 school year, demonstrating that the loss in funding is imminent is impossible to demonstrate. Even if a projected budget was drafted and enacted based on preliminary figures for school funding, a court will likely hold that such harm would not be suffered until the lower levels of funding were actually provided to the school system.

Additionally, the law underlying our application is not well-settled. While the Court in Abbott v. Burke, 206 N.J. 332 (2011) (hereinafter “Abbott XXI”) found that the State had not met its obligation to provide a “thorough and efficient” education, it did so in the context of SFRA as written and **funded**. Here, the newly passed bills alter the funding formula under SFRA, with the reduction and ultimate elimination of Adjustment Aid while permitting municipalities to raise revenue at a faster pace to make up a shortfall in money. These changes to the funding formula for SFRA have obviously not been presented to a court for review to determine whether same meets the Constitution’s requirement for a “thorough and efficient” education and thus a court is not likely to find that JCBOE’s position is well settled. For these reasons, an application for a preliminary injunction would likely fail

We would therefore suggest JCBOE file a complaint in due course before the Commissioner. Upon filing an action with the Commissioner, JCBOE may then apply to the Commissioner for a summary decision via motion, which may be decided directly by the

Commissioner or transmitted to the Office of Administrative Law (“OAL”) for disposition. N.J.A.C. 6A:3-1.12. All of the rules governing these proceedings “shall be considered general rules of practice to govern, expedite, and effectuate the procedure before, and the action of the Commissioner in connection with, the determination of controversies and disputes under the school laws.” N.J.A.C. 6A:3-1.16.

Additionally, we would recommend a student, or students, that are representative of students of the JCBOE, join JCBOE’s application to the Commissioner. This would resolve any issues of standing as courts have held that “municipalities and their boards of education generally lack standing to assert the rights of third-party taxpayers.” Borough of Seaside Park v. Commissioner of New Jersey Dept. of Educ., 432 N.J. Super. 167, 210-211 (App. Div. 2013)(citing Stubaus v. Whitman, 339 N.J. Super. 38 (App. Div. 2001)).

II. Causes of Action

The JCBOE’s cause of action would challenge the constitutionality of the reduction, and ultimate elimination, of Adjustment Aid in the final bill. This cause of action would focus on the State’s failure to fully fund SFRA under the statute (N.J.S.A. 18A:7F-43 et al.) and that deviations therefrom result in a loss of thorough and efficient education to the JCBOE’s students. See Board of Ed. Of Tp. Of East Brunswick, 48 N.J. at 108. Any argument will cite to evidence of harm caused by the failure to adequately fund the Jersey City school system such that a thorough and efficient education can be provided to students.

JCBOE’s argument would focus on the ruling in Abbott XX where the Court found that SFRA was constitutional as written and where the State was relieved of its prior obligations under earlier remedial orders, “on the expectation that the State will continue to provide school funding

aid...at the levels required by SFRA's formula each year." 199 N.J. at 146. The JCBOE's argument would be that the State violated its obligations when it failed to effectuate its mandate and provide school funding aid at the levels required by SFRA's formula, and therefore the State's application of SFRA is unconstitutional as applied to the students of Jersey City. The JCBOE would be required to demonstrate any reduction would result in falling further below the "adequacy budget", a central feature of SFRA.

The JCBOE's arguments would have to be fact specific, namely, that Jersey City's inability to meet the local fair share necessitates the continuation of Adjustment Aid in order to alleviate municipal overburden, especially as it relates to Jersey City's historic status as an Abbott district. As set forth above, it was the Court's finding in Abbott XX that SFRA was constitutional as written **because** it provided for Adjustment Aid to alleviate municipal overburden.

The JCBOE's arguments would be based on one or more of the following points: (1) the plain language of the Adjustment Aid provision dictates that adjustment aid is applicable "for the 2011-2012 school year **and for each school year thereafter**," i.e., there is no end-date in the statute for the cessation of Adjustment Aid, and thus, it must continue as long as the underlying purpose of the Adjustment Aid remains¹; and/or (2) the purpose of the Adjustment Aid is to ensure that once SFRA was fully funded, no City would be adversely affected by a sudden change in funding, and by only fully funding SFRA for FY 2019, this change in funding would overburden the Jersey City tax base.

¹ As set forth above, the Supreme Court's discussion of Adjustment Aid in Abbott XX suggests a more limited life, during the transition period, posing a problem for the first path set forth above.

Beyond Abbott XX, there are very few Superior Court decision or administrative decisions discussing the intent of Adjustment Aid. At least one administrative law judge has found that the failure to provide Adjustment Aid does not alter a school's ability to provide a thorough and efficient education.² Abbott XX provides the more substantive analysis of municipal overburden, Adjustment Aid generally, and the need for Adjustment Aid in light of claims of a municipality's inability to achieve its local fair share. The JCBOE would further argue that even if Adjustment Aid was meant to be temporary, which is contradicted by a plain reading of SFRA, the continuation of Adjustment Aid is necessary as a direct result of the State's failure to fully fund SFRA during its implementing year, negating the Adjustment Aid's underlying purpose and intention.

While a plain reading of the New Jersey Constitution indicates that it is the State's responsibility to provide a thorough and efficient education, and not the local municipality, an argument likely to be raised in opposition to JCBOE's action is that it is also the responsibility of the City to provide a thorough and efficient education. The Court's finding in Abbott XX, requiring municipalities to assist in funding education through LFS and permitting them to increase taxes 2% per year to meet the Adequacy Budget, indicates that it is within the power of the State to require municipalities to generate revenue to fund their school systems. While arguments can be made that by placing an increased burden on Jersey City, as opposed to the State, to provide funding such that a thorough and efficient education is possible, such arguments would necessitate involving Jersey City and also obtaining facts as to the amount of revenue which would need to be

² Learning Community Charter School, et al., v. Board of Education of the City of Jersey City, OAL Dkt. No. EDU01069-12(OAL 2015).

generated to provide T&E and meet the Adequacy Budget and the impacts that such revenue generation would have on Jersey City's tax base.

Thus, the arguments would be premised upon Jersey City's inability to meet the local fair share numbers, and the corresponding need for Adjustment Aid to continue to fill the gap.

EXECUTIVE SUMMARY OF JUNE 29, 2018 MEMORANDUM

CONFIDENTIAL ATTORNEY WORK PRODUCT

ATTORNEY-CLIENT COMMUNICATION

Our June 29, 2018 memorandum recommends that if the Jersey City Public School District Board of Education ("JCBOE") chooses to challenge the newly passed bills impacting Adjustment Aid, it should file a Petition of Appeal with the Commissioner of Education ("Commissioner"). Upon that filing, JCBOE should file a motion for a summary decision. We also recommend that a student that is representative of the students of the JCBOE join JCBOE's application.

This recommendation is based on the Commissioner's exclusive jurisdiction over controversies and disputes that arise under school law pursuant to N.J.S.A. 18A:6-9. The Commissioner's exclusive jurisdiction makes it unlikely that a Court will entertain an action without first filing a Petition of Appeal before the Commissioner.

The JCBOE's Petition of Appeal would challenge the constitutionality of the reduction, and ultimate elimination, of Adjustment Aid in the final bill. This challenge would focus on the State's failure to fully fund SFRA under the statute and that deviations therefrom result in a loss of thorough and efficient education to the JCBOE's students.

The JCBOE's argument would be based on two main points. First, the plain language of the Adjustment Aid provision dictates that adjustment aid is applicable "for the 2011-2012 school year **and for each school year thereafter**," i.e., there is no end-date in the statute for the cessation of Adjustment Aid, and thus, it must continue as long as the underlying purpose of the Adjustment Aid remains. Second, the JCBOE will assert that the purpose of the Adjustment Aid is to ensure that once SFRA was fully funded, no City would be adversely affected by a sudden change in funding, and this change in funding would overburden the Jersey City tax base. Note that we expect the State to raise various arguments in opposition to these assertions, including that Jersey City bears some responsibility for providing a thorough and efficient education to its students and that Adjustment Aid was intended under the Abbott cases to be a temporary fix so that municipalities would not face a sudden short fall in funding.

As this juncture, we believe that any action seeking injunctive relief, whether before the Commissioner or through the Court, will be unsuccessful. First, under the facts as they currently exist, the JCBOE would be unable to demonstrate that any irreparable harm would be imminent, a requirement under the interpreting case law for a preliminary injunction. This is because the newly passed bills will not affect school funding until the 2019-2020 fiscal year; and any potential irreparable harm will not happen until after those funds are lost. Additionally, as no Court has yet considered these newly enacted bills, JCBOE's legal rights as they pertain to this altered school funding formula are not well settled, which it must be able to establish to obtain injunctive relief. As such, an Order to Show Cause seeking a preliminary injunction would be denied for not satisfying these requirements.